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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953 No. 229

ROLAND O. HAINES ET AL., Comprising
Keystone Policyholders' Committee,
Appellants

v.

COMMONWEALTH OF PENNSYLVANIA ET AL.

Appeal from the Supreme Court of Pennsylvania, Middle District

RESPONSE TO PETITION FOR REHEARING

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RESPONSE TO APPELLANTS' PETITION FOR REHEARING

Appellees, William Goldstein, et al., Intervenors, for convenience referred to as the Goldstein Committee, and Appellee, Claude A. Hanley, Ancillary Receiver in the State of Maryland, pray that this Court deny Appellants a rehearing of the Order dated October 19, 1953, dismissing their Appeal and denying Certiorari for the reasons hereinafter set forth. For convenience, the response follows, for the most part, the corresponding averments of the petition without regard to their order of importance.

1. The Attack on the Supreme Court of Pennsylvania

Under Rule 33, a petition for rehearing of an Appeal must briefly and distinctly state its grounds, and rehearing of an order denying certiorari must state grounds which are confined to intervening circumstances of substantial or controlling effect, or, being substantial, have not previously been presented.

A vicious and unwarranted attack upon the integrity of the Supreme Court, the office of the Attorney General and the office of the Insurance Commissioner of a great Commonwealth historically noted for the development of jurisprudence and the administration of justice, is not a ground for rehearing no matter how substantial the attack. Counsel for appellees feel constrained, as officers of the Court, to challenge this conduct even at the risk of diverting attention from the issue at bar—a reaction and result which was obviously intended by appellants.

Appellants were granted an enlargement of the time within which to file their petition for rehearing upon a

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motion which represented that they would obtain a certificate from the Chief Justice of the Supreme Court of Pennsylvania which would satisfy the requirements of 28 U. S. C. 1257(2). Appellants were unable to obtain such a certificate and their motion for enlargement of time was, therefore, based upon representations which were without foundation. However, their disappointment does not justify impugning the integrity of the Supreme Court and the public officials of the Commonwealth of Pennsylvania as appellants have by direct assault and thinly veiled innuendoes on page 2 of their petition, as follows:

> "But this case has a manifold significance. In it the Supreme Court of Pennsylvania has approved an amazing series of open and apparent violations of the Pennsylvania Insurance Department Law by the then Attorney General, who is now a member of that Court, and by the former Insurance Commissioner, acting in the name of the Commonwealth, which effectively denudes that law of the statutory safeguards essential to due process. Although the record indicates that the former Attorney General as a member of the Supreme Court of Pennsylvania did not participate in the consideration or decision of this case by the Pennsylvania Supreme Court who can deny that his mere presence on the Court when his prior actions are being attacked must have caused his influence to be felt, as reflected in the fact that when the petition for appeal to this Court was presented to the Chief Justice of the Supreme Court of Pennsylvania it was denied by a per curiam order of the Court. Such violations of the Pennsylvania Insurance Department Act, together

with other conduct apparent from the record and directed to the same result are not only consistent with but strongly indicative of a studied and deliberate effort to deprive the Company and its members of a fair opportunity to resist the dissolution decree."

The foregoing statement is brash impertinence subject to the strongest possible censure. It is all the more to be regretted because of the extreme courtesy extended by the State Courts to the numerous and different counsel employed by appellants from time to time. Appellants were first permitted to intervene in the proceedings. They were then permitted to appeal from the decision of the Common Pleas Court of Dauphin County notwithstanding that they were not the petitioners in the subject matter; and notwithstanding that the Insurance Commissioner, as petitioner, notified the Supreme Court of Pennsylvania that he did not intend to appeal and that he saw no purpose to disturbing the Order of the lower court. Finally, at their request, the Supreme Court of Pennsylvania held the record for a period of ninety days in order to permit appellants to file a petition for leave to appeal to the Supreme Court of the United States.

Justice Thomas McKeen Chidsey, Attorney General at the time the original order of liquidation was entered and, therefore, technically a party to the record, withdrew from all consideration of the case in accordance with time honored custom. Yet, appellants charge that his very presence on the bench influenced the Supreme Court of Pennsylvania to deny their petition for leave to appeal to this Court by means of a per curiam order. It is a matter of conjecture whether appellants are critical of the refusal to allow the appeal, as such, or the fact that it was accom-

plished by means of a per curiam order. In either event, it is assumed that appellants are likewise critical of the Supreme Court of the United States for dismissing their appeal, also by means of a per curiam order.

Appellants discuss other matters under the title, "The Importance of the issue", all of which have been fully brought to the attention of this Court previously. They will be briefly discussed at another point in this response.

2. The Dismissal of the Appeal

Since the order of this Court dismissing the appeal for want of jurisdiction under 28 U. S. C. 1257(2), appellants obtained a certificate from the Chief Justice of the Supreme Court of Pennsylvania attached as Appendix "A" to their petition for rehearing. This certificate merely re-affirms what was already included in the Opinion of the Supreme Court of Pennsylvania; that appellants were not denied due process through failure to receive proper notice of the liquidation proceedings. In no respect does the certificate supply the requirement that the validity of a state statute as being repugnant to the Constitution or the laws of the United States must have been drawn in question.

Appellants' motion for an enlargement of time within which to file its petition for rehearing specifically states that they would furnish a certificate to the effect that the Federal question required to give this Court jurisdiction under 28 U. S. C. 1257(2) was actually considered and decided by the Supreme Court of Pennsylvania and was necessary to a determination of the case. It is obvious that the basis of appellants' petition, as represented by them,

has not been established and for this reason alone the petition for rehearing should be dismissed.

Appellants' attempt to argue that "the certificate affirms that the Court determined the validity of the Statute under the 14th Amendment and resolves any ambiguity in the decision on that point". This is wishful thinking. Counsel for appellants have been somewhat less than candid in making this argument since they did endeavor to obtain a certificate which might supply the deficiency, but they were unable to do so because no state statute was ever drawn in question as being repugnant to the Federal Constitution. The certificate which was issued was intended merely to confirm what had already been stated in the Opinion of Justice Bell.

Appellants have included several other matters in their discussion of this subject which have already been adequately argued previously. One statement, however, warrants a reply. On page 6 of appellants' petition it is stated that "The Court also entertained and considered until April 4, 1953 a Motion for Reargument of its decision of December 8, 1952 in which the *principal ground* relied upon was the validity of the statute as construed and applied under the due process provision of the Federal Constitution."

The reargument of the case must necessarily have been dependent upon the assignments of error and briefs already in possession of the Supreme Court of Pennsylvania. Reference to the appellants' Statement of Points to be Argued on Appeal (set forth in Appendix "A" attached hereto) indicates that appellants relied almost exclusively upon non-federal grounds.

3. The Non-Federal Grounds

The certificate issued by the Chief Justice of the Supreme Court of Pennsylvania leaves unchanged the many non-federal grounds upon which the decision was predicated.

The appellants presented their case to vacate the decree of dissolution upon the equitable doctrine of mistake of fact. There was no related Federal question. They joined with a succeeding Attorney General and Insurance Commissioner in the filing of an unverified petition, in which it is alleged that the decree of dissolution was entered under a mistake of fact in that the Company was solvent at the time of the decree and remained solvent thereafter. Nothing was mentioned about lack of notice or an absence of due process. (R. 13a)

Through one of their own witnesses, the present Insurance Commissioner, it was established by means of a Federal Income Tax Return filed on March 15, 1951, that the Company, as of December 30, 1950, was insolvent by more than $1,500,000.

All counsel agreed at the trial of the case that the sole issue was solvency (R. 200a, 201a, 210a, 220a, 223a). Further, appellants conceded that the Company should be in the hands of the Insurance Commissioner under Section 502 of the Pennsylvania Insurance Department Act. (R. 203a-205a) By admitting the application of Section 502, they conceded that the Company was in a hazardous condition and that every requirement of notice and opportunity to be heard pursuant to that section had been met. That the Company was subsequently ordered into liquidation under Section 506 is consistent with the long established interpretation of the Insurance Department Act by

the Supreme Court of Pennsylvania. *Commonwealth vs. Ministers Protective Society*, 294 Pa. 6, 10, 16 (1928). The Supreme Court of the United States also recognized the integrity of the correlated Sections (502, 503, 504 and 506) in connection with taking possession and liquidating an insurance company. *Penn General Casualty Company vs. Commonwealth of Pennsylvania*, 294 U. S. 189 (1935). All of this has already been fully presented to this Court in Appellees' Statement Opposing Jurisdiction and Motion To Dismiss (Pages 15-17).

The issue of due process was raised only as a last resort after appellants failed to prove the allegations of the original petition and is only intended to becloud the issue. Sections 213, 311 and 321 of the Insurance Department Act obviously relate to routine regulations covering the supervision of going insurance companies.

The Company and all of its officers received more than adequate notice of all of the proceedings. The Company was represented by counsel who entered a general appearance in the litigation. Every opportunity to restore the deficit was afforded and the Company admitted its inability to do so. The officers admitted insolvency and criminal falsification of records. All of this is recorded in greater detail, with specific reference to the record, in appellees' Statement Opposing Jurisdiction.

Due process has never meant that every one who may be affected by a decree need have notice and be a party to the proceedings at every stage. The Company and its officers received adequate notice. Policyholders are not entitled to a special type of notice under the statute, separate and apart from the notice to the Company. Surely, it is not to be expected that approximately 105,000 policyholders were to receive notice and given an opportunity to be heard

while the assets were being dissipated. The due process of law clause requiring notice and an opportunity to be heard follows a rule of reason *Anderson National Bank vs. Luckett*, 321 U. S. 233. Curiously enough, appellants concede this to be the law because they admit that the Insurance Commissioner had the right to take possession of the Company under Section 502 pursuant to the very notices which they claim to be inadequate for the purposes of Section 506.

Appellants take it upon themselves to speak for 105,000 policyholders of the dissolved company when their own petition for intervention indicates that they represent only five policyholders (R. 1975a). As opposed to this, the Insurance Commissioners of two sister states joined with the Insurance Commissioner of Pennsylvania in seeking the liquidation of the Company. Claude A. Hanley, Ancillary Receiver for the Keystone Mutual Casualty Company in the State of Maryland, and one of the appellees joining in this Response, represents thousands of policyholders, claimants and creditors of that state. The Goldstein Committee, the other appellee, represents policyholders and creditors having claims in excess of one-half million dollars (R. 90a).

The policyholders have a vested right in the Company only to the extent that its assets exceed its liabilities. The provisions of the Pennsylvania Insurance Department Act were meant not only for the benefit of policyholders. Under Section 502, which appellants agree was an appropriate section, such relief is authorized "as the nature of the case and the interests of its policyholders, creditors, stockholders, or the public may require".

As a matter of fact, under the law of Pennsylvania,

there are no policyholders of a mutual insurance company when the policies have expired. All of the policyholders became creditors of the dissolved company and their rights are adequately protected in the fund to be secured upon liquidation. (See analysis of the law in the Opinion of Neely, J. R. 1733a.)

If the policyholders were entitled to an opportunity to be heard it could only be for the purpose of establishing the solvency or insolvency of the Company. Each and every policyholder who expressed any interest in the subject matter was permitted to intervene in the proceedings either independently or through committees (See Docket Entries —Appendix "B" of Appellants' Petition).

The certificate attached as Appendix "A" to appellants' Petition leaves undisturbed the several non-federal grounds which independently and adequately support the judgment of the Supreme Court of Pennsylvania, all of which is more specifically detailed in pages 20-22 of appellees' Statement Opposing Jurisdiction.

Conclusion

Justice will best be served by a termination of the litigation. The appellants have delayed the administration of justice by a belated contention that the validity of the statute in Pennsylvania under the 14th Amendment is the important issue, but the refusal of the Chief Justice of the Supreme Court of Pennsylvania to give the appellants the certificate which would meet the requirements of Section 28 U. S. C. Section 1227(2) clearly establishes that the validity of the statute was never drawn in question.

The litigation in this matter has been protracted and extended beyond reason by the appellants who have never

been able to establish a basis for their attack upon the decree of dissolution. Twenty-six states of the United States have accepted the decree of dissolution entered by the Courts of the Commonwealth of Pennsylvania. Full faith and credit has been given to that decree in all of the states. Assets have been collected and turned over to the Insurance Commissioner of the Commonwealth of Pennsylvania as Statutory Liquidator. Simple justice would require that the rights of the claimants to the fund be adjudicated and final distribution be made to the creditors entitled.

It is therefore respectfully requested that rehearing of the Order of October 19, 1953 dismissing the appeal and denying certiorari, be refused, and that the record be returned for compliance with the decision and Order of the Courts of the Commonwealth of Pennsylvania.

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Counsel for Appellees.

APPENDIX "A"

STATEMENT OF POINTS TO BE ARGUED UPON APPEAL

1. At the time of the decree of dissolution, when the company was declared to be insolvent, was the company in fact solvent and has the company been solvent from that date to the present time?

2. Do the findings of fact made by the Court below concerning the incorrectness of the reserve for liability and Workmen's Compensation losses and the reserve for advance premium deposits as contained in the Linder Report and as testified to by Linder on the stand, together with its findings, that the finances of Keystone Mutual Casualty Company were in an unsound condition on June 26, 1947 and until the time of the Hearing in this case, from the standpoint of the policyholders, the creditors and the public, disclose manifest error in their deduction?

3. Was Goldstein's Exhibit No. 5, the income tax return filed in behalf of the Company by the Insurance Commissioner for the year 1950, not properly received in evidence?

4. Was the decree of dissolution of the Court below, entered on June 26, 1947, ordering the Insurance Commissioner to liquidate the Keystone Mutual Casualty Company, entered under a material mistake of fact?

5. Did the decree of dissolution, entered on June 26, 1947, deprive the company and its policyholders of property without due process of law?

6. Should the decree of dissolution, entered on June 26, 1947, be vacated, and a decree entered returning the Company's property to the custody of the Insurance Commissioner with provisions permitting its restoration to private management and operation?

REED, SMITH, SHAW & MCCLAY

WALKER & NEWMAN

Counsel for Appellant.